Supreme Court of The United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, *Petitioner*,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON MERITS FOR RESPONDENT

WESLEY M. WALKER,
Greenville, S. C.

RAY R. WILLIAMS,
Greenville, S. C.
Attorneys for Respondent

INDEX

	Page
Opinions Below	1
Juridiction	1
Constitutional and Statutory Provisions Involved	2
Questions Presented	6
Statement	6
Summary of Argument	14
Argument:	
I. The Evidence Establishes that Petitioner sustained the injuries of which he complains while engaged in work which constituted a part of Respondent's trade, business or occupation and his recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina	20
A. The decision of the Court below that the work performed by the Bouligny Company under the contract was done in carrying on the trade or business of the Respondent was conclusively supported by the evidence	26
B. The testimony of A. J. Hurt and E. V. McMahon	32
C. The construction contract by the Respondent and R. H. Bouligny, Inc., Defendant's Exhibit "C"	35
D. The Statute under which the Respondent was organized and operating	38
II. The question of whether Petitioner's injuries were sustained while he was engaged in work which constituted a part of Respondent's business, trade and occupation constituted a question of law for the Court and not an issue of fact for the jury	40
III. The Petitioner, whose motion in the District Court to strike an affirmative defense was granted and who was simultaneously offered an opportunity to pre-	

Page

sent reply testimony on the same defense upon which the Respondent based a motion for a directed verdict which was overruled, does not have the right to a new trial upon the ground that Appellate Court did not have the power to reverse the rulings of the District Judge with direction to enter judgment for the defendant 49

Conclusion 52

Appendix 53

TABLE OF CASES

Page

Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E. 2d 566 ..... 15, 26, 38, 41

Ballard v. Southern Cotton Oil Co. (D.C. S.C.) 145 F. Supp. 882 37

Benbow v. Edmunds High School, 220 S.C. 363, 67 S.E. 2d 680 39

Berry v. Atlantic Greyhound Lines, Inc. (C.A. 4th) 114 F. 2d 255, 30 F. Supp. 188 25

Boseman v. Pacific Mills, 193 S.C. 479, 8 S.E. 2d 878 ..... 15, 25, 31

Brunet v. S. S. Kresge, (C.A.A. 7th) 1941, 115 F. 2d 713, Certiorari Denied 61 S. Ct. 1102, 313 U.S. 577, 85 L. Ed. 1535 ..... 19, 47

Bryan v. United States, 70 S. Ct. 317, 338 U.S. 552 50

Continental Casualty Co. v. Haynie et al, 182 Ga. 60, 186 S.E. 683 25

Doane et al v. E. I. DuPont deNemours & Co., (C.A. 4th) 209 F. 2d 921 ..... 14, 21, 24, 41

Fox v. Fafnir Bearing Co., 107 Conn. 189, 139 A. 778 25

Galloway v. United States, 319 U.S. 372, 63 S. Ct. 1077 26

Home Life Insurance Co. of New York v. Moon, C.C.A. W. Va. 1940, 110 F. 2d 184, certiorari denied 61 S. Ct. 15, 311 U.S. 659, 85 L. Ed. 422, rehearing denied 61 S. Ct. 129 311 U.S. 726, 85 L. Ed. 473, and 61 S. Ct. 173, 311 U.S. 728, 85 L. Ed. 474, rehearing denied, 62 S. Ct. 298, 86 L. Ed. 568 48

Hopkins v. Darlington Veneer Co., et al, 208 S.C. 307, 38 S.E. 2d 4 25

Clarence Hudson v. Horry Electric Cooperative (S.C. Circuit Court) (See Appendix, p. 53) 27

Isthmian S. S. Co. of Delaware v. Olivieri, et al, (C.C.A. 5th) 202 F. 2d 492 25

Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 25

TABLE OF CASES--Continued

Page

Kennerly, et al v. Ocmulgee Lumber Co., et al, 206 S.C. 481, 34 S.E. 2d 792 ..... 15, 22, 25, 36
Lee v. Claxton, 70 Ga. App. 226, 28 S.E. 2d 87 25
Lowden v. Denton, C.C.A. Mo. 1940, 110 F. 2d 274, Certiorari denied, 60 S. Ct. 1100, 310 U.S. 652, 84 L. Ed. 1417 48
Marchbanks v. Duke Power Co., et al, 190 S.C. 336, 2 S.E. 2d 825 ..... 15, 22, 23, 38
Miles v. West Virginia Pulp and Paper Co., 212 S.C. 424, 48 S.E. 2d 26 24
McDowell v. Stilley Plywood Co., et al, 210 S.C. 173, 41 S.E. 2d 872 25
Olsen v. Canter, 93 Ind. App. 150, 176 N.E. 27 25
Purkable v. Greenland Oil Co., 122 K. 720, 253 Pac. 219 25
Sears Roebuck & Co. v. Wallace (C.A. 4th) 172 F. 2d 802 24
Sherlock v. Sherlock, 112 Neb. 797, 201 N.W. 645 25
Smith, et al v. Fulmer, et al, 198 S.C. 91, 15 S.E. 2d 681 25
State v. Bennett Building Co., 154 Med. 159, 140 A. 52 ..... 23, 38
Tolfree v. Wetzler, 22 F. 2d 214 (C.A. 3rd) 39
United States v. Standard Oil Co. of Indiana, et al (Ex Parte U.S.) 101 F. 2d 870 46

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

7th Amendment, *U. S. Constitution* 2
28 U. S. C. 2106; 28 U. S. C. A. 2106 2
Title 72, *Workmen's Compensation, Code of Laws of South Carolina*, 1952: 2
Sec. 72-101 2
Sec. 72-111 2
Sec. 72-114 3
Sec. 72-121 3
Sec. 72-123 3
Chapter 15, *Rural Electric Cooperative Act, Code of Laws of South Carolina*, 1952:
Sec. 12-1021 3
Sec. 12-1025 3
National Rural Electrification Act of 1936 4
Federal Rules of Civil Procedure, Rule 50 ..... 18, 19, 48

Supreme Court of The United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, *Petitioner*,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals (R. 71) is reported in 238 F. (2d) 346.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1956 (R. 71). The Petition for Rehearing was denied on November 15, 1956 (R. 82). The Petition for a Writ of Certiorari was filed on December 19, 1956, and was granted on February 25, 1957 (R. 83). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 *U. S. C.* 2106.

"The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 72, *Workmen's Compensation, Code of Laws of South Carolina*, 1952.

"Sec. 72-101. When Acceptance of Provisions Presumed.

"Every employer and employee, except as stated in this chapter, shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner provided in Section 72-105.

"Sec. 72-111. Liability of Owner to Workmen of Subcontractor.

"When any person, in this section and Sections 72-113 and 72-114 referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 72-113 to 72-116 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any work-

man employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

"Sec. 72-114. Construction When Proceedings are Against Owner or Contractor.

"When compensation is claimed from or proceedings are taken against an owner or contractor, then, in the application of this Title, reference to the owner or contractor shall be substituted for reference to the subcontractor, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the subcontractor by whom he is immediately employed."

"Sec. 72-121. Employee's Rights Under Title Exclude All Others Against Employer.

"The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-123. Only One Remedy Available.

"Either the acceptance of an award under this Title or the procurement and collection of a judgment in an action at law shall be a bar to proceeding further with the alternate remedy."

1952 *Code of Laws for South Carolina*, Chapter 15, Rural Electric Cooperative Act.

"Sec. 12-1021. For What Purpose Organized.

"Cooperative non-profit membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas."

"Sec. 12-1025. Powers of Cooperative.

"In addition to the powers conferred on all private corporations by Sec. 12-101 a cooperative shall have power:

"(5) To construct, purchase, take, receive, lease as lessee or otherwise acquire, to own, hold, use,

equip, maintain, and operate and to sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge or otherwise dispose of or encumber electric transmission and distribution lines or systems, electric generating plants, electric refrigeration plants, lands, buildings, structures, dams, plants and equipment and any and all kinds and classes of real or personal property whatsoever which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized;

"(8) To construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including, without limitation of the generality of the foregoing, all roads, highways, streets, alleys, bridges and causeways, and upon, under and across all publicly owned lands, subject, however, to the requirements in respect to the use of such thoroughfares and lands that are imposed by the respective authorities having jurisdiction thereof upon corporations constructing or operating electric transmissions and distribution lines or systems;

"(10) To conduct its business and exercise any or all of its powers within or without this State; and

"(11) To do and perform any and all other acts and things and to have and exercise any and all other powers which may be necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized."

RURAL ELECTRIFICATION ACT OF 1936

"Sec. 4. The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, State Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 3 (d) and 3 (e) but without

regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas to discharge or refinance long term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: *Provided*, That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this Act. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided further*, That all such loans shall be self liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further*, That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 5 shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed."

(May 20, 1936, ch. 432, #4, 49 Stat. 1365; Sept. 21, 1944, ch. 412, Title V, #502 (a), 503, 58 Stat. 739, 740; Dec. 23, 1944, ch. 725, 58 Stat. 925, 926; June 29, 1948, ch. 703, 62 Stat. 1070; Oct. 28, 1949, ch. 776, #4 (e), 63 Stat. 948; June 15, 1955, ch. 139, 69 Stat. 132.)

QUESTIONS PRESENTED

I

Was it established by the evidence that Petitioner sustained the injuries of which he complains while engaged in work which constituted a part of Respondent's trade, business or occupation and was his recovery limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina?

II

Did the question of whether Petitioner's injuries were sustained while he was engaged in work which constituted a part of Respondent's business, trade and occupation constitute a question of law for the Court and not an issue of fact for the jury?

III

Does the Petitioner, whose motion in the District Court to strike an affirmative defense was granted and who was simultaneously offered an opportunity to present reply testimony on the same defense upon which the Respondent based a motion for a directed yerdict which was overruled, have the right to a new trial upon the ground that Appellate Court did not have the power to reverse the rulings of the District Judge with direction to enter judgment for the defendant?

STATEMENT

In this action the petitioner brought suit to recover damages for bodily injuries against respondent, a South Carolina corporation organized and operating under the provisions of the Rural Electric Co-operative Act of South Carolina, as set forth in Chapter 15 of Volume 1 of the 1952 *Code of Laws of South Carolina* (Sections 12-1001, et seq.). The petitioner was an employee of a contractor, R. H. Bouligny, Inc., engaged in doing certain construction work for respondent pursuant to a written contract (defendant's Ex. "C;" R. 23-28, 206).

At the time of the accident on February 17, 1953, the

petitioner was performing work for his employer under its contract with respondent. The petitioner's complaint alleged that respondent was engaged in the business of supplying, transmitting and distributing electric power and that petitioner was engaged in construction work at or near a sub-station owned by respondent near Walhalla, South Carolina. The original complaint alleged damages in the sum of One Hundred Sixty-Four Thousand Dollars ($164,000.00) and immediately preceeding trial, the District Judge allowed the petitioner to amend his complaint by increasing the amount of damages alleged to the sum of Two Hundred Thirty-Three Thousand, Nine Hundred Forty-Six and 65/100 Dollars ($233,946.65). In its original answer, the respondent set up as a defense that petitioner had been compensated for his injuries under the South Carolina Workmen's Compensation Law. The petitioner moved to strike the defense and at approximately the same time, the respondent noted a motion to amend the allegations in its answer with respect to the defense under the Workmen's Compensation Act by making additional allegations in this regard. These motions were heard on November 5, 1955 and by the Order dated November 11, 1955 the petitioner's motion to strike was denied and respondent's motion to amend was granted. In its answer (R. a-c) the respondent denied any negligence on its part and alleged that any negligence that may have occurred to cause petitioner's injuries was solely that of the said R. H. Bouligny, Inc., the employer of the petitioner; that Bouligny, Inc. and respondent were properly qualified and operating under the South Carolina Workmen's Compensation Act and petitioner had filed claim in the manner provided by law and collected full benefits from the said employer; that the work being done pursuant to said written contract at the time and place of petitioner's injuries was a part of the trade and business of the respondent. Therefore, the petitioner had no right to recover against respondent in a common law action but petitioner's rights were limited to and determined by the South Carolina Workmen's Compensation law. The respondent further contended contributory negligence on the part of the

petitioner and that petitioner's injuries were an unavoidable accident insofar as respondent was concerned.

The Workmen's Compensation Act of South Carolina, title 72 of the *South Carolina Code of* 1952, provides that when an owner undertakes to execute any work which is a part of his trade or business and contracts with any other person for the execution for the whole or any part thereof the owner shall be liable to pay to any workman employed in the work any compensation under the Act which he would have been liable to pay if the workman had been immediately employed by him (Section 72-111). At the conference before the District Judge immediately preceding the beginning of the trial (R. 1-5), and at which all counsel were present, the petitioner's counsel admitted into the Record all requirements of this complete defense under the South Carolina Workmen's Compensation Act except one, to-wit, that the work being done by the contractor, Bouligny, Inc., constituted a part of the trade, business and occupation of the owner, the respondent in this case. Thereupon, the District Judge ordered that all testimony and evidence, including pertinent allegations in the answer by the respondent as to this defense, be excluded from the jury and testimony was allowed only as to the one requirement mentioned above, not admitted by petitioner. Reference is made to the footnote under respondent's answer as printed in the Transcript of Record (R. b-c). In the District Court the petitioner and the respondent contended and the District Judge concluded that, whether the work being done in the construction of facilities for respondent pursuant to said written contract was a part of its trade and business within the meaning of the South Carolina Workmen's Compensation Act was a question of law for the Court (R. 5, 48, 49). In this connection the petitioner in his brief in the Court below contended "Trial Judge was correct in withdrawing issue of application of Sections 72-111 and 72-121 of the *South Carolina Workmen's Compensation Act* as a bar to Appellee's (Petitioner) action and concluding *as a matter of law* that these sections of the Act did not apply to the facts in the instant case as a bar to Appellee's Action."

The respondent, Blue Ridge Rural Electric Co-operative, was organized as an electric co-operative in 1939, under the provisions of the Rural Electric Co-operative Act of South Carolina, Chapter 15 of the *South Carolina Code of Laws of* 1952. Section 12-1021 of this Statute authorizes the organization of co-operative non-profit membership corporations for the purpose of supplying electric energy and extending its use in rural areas. At the time of its organization, respondent took over about 300 miles of line and approximately 1100 consumers from the South Carolina State REA and commenced operating and, as a part of its operation, launched upon a construction program for the expansion of its system and service which has been continuous to the present time. At the time of the trial in the District Court in 1955 respondent had 2,000 miles of line and 10,816 consumers or members. Section 12-1025 of the South Carolina Rural Electric Co-operative Act empowers a co-operative to operate, accumulate and distribute electric energy in rural areas to its members and to construct, acquire, maintain and operate electric generating plants, buildings and equipment, and any and all kinds of property which may be necessary or convenient to accomplish the purposes for which the corporation is organized. The construction work which had been carried on in connection with the enlargement of respondent's system, has been done by its own employees and by contractors, working from time to time under special contracts. The testimony disclosed that respondent maintains an outside crew of 8 linemen and 8 groundmen, one-third of whose time is spent in maintenance and two-thirds in construction work. It owns nineteen pieces of equipment which it uses in connection with its construction work and its other operations. It constantly builds new lines to new consumer members and builds extensions of varying length up to 8 miles. However, after the end of World War II so many persons in rural areas demanded electrical services that respondent employed independent contractors to do a large part of the construction work, while continuing to do a considerable part through its own men. (R. 29-34; 42-46). Its own employees do and have done every type and character of

construction which has gone into its distribution system. Even when the work is done by contract, much detail is involved for it, such as arranging for the making of plans and specifications for the work, the securing of rights of way and franchises, the application for funds, the advertising for bids, the letting of the contract, the purchasing and handling of materials used on the project, the checking of reports filed by the contractor and the engineer, and the disbursement of funds as the work progresses. All of the construction work, whether done by respondent or by outside contractors, was done under the supervision of the Southern Engineering Company, an independent organization conducted by engineers, which was continuously employed by respondent to make sure that the system complied with the requirements of the Rural Electrification Administration of the United States. The construction work is financed with funds borrowed from the United States Government through the National Rural Electrification Administration. On June 23, 1952 in order to expedite its construction work the respondent let a contract to R. H. Bouligny, Inc., a contractor, for the construction of approximately 24.19 miles of new line and 87.69 miles of conversion, two appurtenant sub-stations and a breaker station. Under the provisions of the contract, the respondent furnished the materials used in constructing the sub-stations and the contractor furnished the labor. The sub-stations were constructed on property owned by the respondent and the work was done under the supervision of Southern Engineering Company, as provided in said contract with R. H. Bouligny, Inc., and in a contract between respondent and the Southern Engineering Company. The contract between respondent and the contractor set out in detail the procedure to be followed in connection with the work to be done and the safety rules required for the protection of the contractor's employees (defendant's Exhibit "C;" R. 23-29).

In this action we are concerned with a line on which the contractor did conversion work. The line was converted from a one-phase line to a two-phase line. A one-phase line consists of one wire and a two-phase of two wires, etc. The line in question was a transmission line which provided electric energy for the

residents of a rural community known as the Ebenezer community and the evidence in the case identifies this line as the Ebenezer line. The conversion required the relocation of a portion of the Ebenezer line where it left the highway and the running of a new line from the new connecting point to the sub-station which was also under construction and identified under the contract as the Walhalla sub-station. It was necessary to do the work in such a manner as to continue the service to the Ebenezer community as far as it was possible to do so. The construction contract especially provided in this respect that at the beginning of each day the contractor would notify the owner of the lines to be de-energized and at the end of each day the contractor would notify the owner of the lines to be re-energized. On the day of the accident the Walhalla sub-station was nearly finished but it had not been released by the contractor to the owner. The wires running from the sub-station to the new connecting point on the Ebenezer line were also in place and one of them received current from another source and was used to service the community. This line was brought from the connecting point to a double-end pole located within the fenced area of the sub-station at a distance of 75 feet, and ran thence to the sub-station itself. It was intended that the current should not run to the sub-station but should be cut off at the pole by postponing the installation of a connecting device thereon, known as a jumper, until the sub-station was completed. Through a mistake of a foreman of the contractor, a permanent closed jumper was placed on the pole and thus the current ran through the 75 foot span of wire to the insulators to which the wire was attached on the outside of the sub-station structure.

This accident occurred when the petitioner went to the sub-station in company with his foreman, and upon direction, the petitioner climbed up the sub-station to make a connection to a point inside the sub-station from the wires on the outside of said sub-station that were connected to the insulators as aforesaid and extended from the pole 75 feet away. It is significant that the sub-station was not energized and the petitioner

climbed up its metal framework without hazard. However, the petitioner proposed to make a measurement to determine the length of wire required to make a connection and when he reached out and contacted the wire connected to the insulators on the outside of the sub-station, he was severely injured.

The court below concluded that the testimony with respect to the construction of the sub-stations of the respondent, stated most favorably to the petitioner, discloses that originally respondent built three sub-stations with its own facilities, but that all of the sub-stations which were built after the War, including the six which it was operating at the time of the accident, were constructed for it by independent contractors, and that at the time of the accident respondent had no one in its direct employ capable of handling the technical detail of sub-station construction.

At the conclusion of the respondent's case, the petitioner moved to strike the defense that defeated his claim by reason of the fact that he was engaged in work which was a part of the trade, business and occupation of the respondent within the meaning of the South Carolina Workmen's Compensation Act (R. 48). The District Judge inquired of respondent's counsel at that time if they contemplated offering any testimony in reply and he stated that he did not know of any reply that was necessary. The District Judge stated that the issue was a question of law (R. 48) and after hearing from counsel for respondent, he granted the motion. It is clear from the Record (R. 49, 50, 51, 52) the District Judge took the view that the construction work of respondent by its own employees or through an independent contractor did not constitute a part of its business, trade and occupation, because it did not carry on such work by contract for third parties.

After this motion to strike was granted, in response to the Court's inquiry, the Petitioner advised that they had nothing in reply (R. 52). Thereupon the respondent moved for a directed verdict and the Court allowed respondent to include as a ground in its motion the defense which had been stricken (R. 52, 53, 54). This motion was denied and the case was

submitted to the jury on the sole issues of negligence and contributory negligence. The jury returned a verdict of $126,786.80 in favor of petitioner and in due time the respondent moved for judgment non obstante veredicto or for a new trial and the same was denied. The judgment was duly entered and the respondent appealed to the Court below. On appeal, the Court below concluded there was no doubt that respondent was not only in the business of supplying electricity to rural communities but also in the business of constructing the lines and sub-stations necessary for the distribution of the product, if these words are given their ordinary significance. The Court below further concluded that there could be no doubt that all of the work covered by the Bouligny contract was of the class which respondent was empowered by its Charter to perform and at the time of the accident resulting in the injury to petitioner, the work being done was a part of the trade, business and occupation of the respondent.

The Court below further stated it was abundantly proved that the accident was caused primarily by the negligence of employees of the Bouligny Company, which is not a party to the instant suit. The Opinion stated that the sufficiency of the evidence to show negligence on the part of the co-operative was not free from doubt, but that it was not necessary to decide this point in view of the basic defense that the petitioner's recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina. The Court below repudiated the contention of the Petitioner that in the meaning of the Compensation statute, construction work is not a part of an owner's business, unless it is of such a character that ordinarily it would be performed by his own employees. The petitioner was relying on evidence that since the War respondent has sub-let the construction of sub-stations to outside contractors, and the line work performed by its own employees had been limited in extent. The Court held that the statute recognizes the practice of letting out to others the actual performance of one's business and subjects the owner to liability for compensation to injured workers, the manifest purpose being to afford the benefits of compensation to the men who are

exposed to the risk of its business, and to place the burden of paying compensation upon the organizer of the enterprise. In consequence, both the owners and the contractors whom he engages to do his work, are subjected to the requirements of the Act and the workers receive double protection. The Court held that the motion of the defendant in the District Court for a directed verdict in its favor should have been granted and, failing this, the subsequent motion of the defendant for judgment in its favor non obstante veredicto should have been granted. The judgment of the District Court was reversed with direction to enter judgment for the defendant.

SUMMARY OF ARGUMENT

The evidence in the case at bar conclusively establishes that Petitioner sustained his injuries while engaged in work which constituted a part of Respondent's trade and business. At the conference before the District Judge immediately preceding the trial, admissions were made by Petitioner that the Respondent, Blue Ridge Electric Cooperative, Inc., and the contractor, R. H .Bouligny, Inc. were duly filed and operating under the South Carolina Workmen's Compensation Act (1952 Code of Laws, Title 72); that the Petitioner elected to receive and accepted full benefits provided by the Compensation Law and that Respondent occupied the status of owner under the Act, provided the work being done when Petitioner's injury occurred constituted a part of the trade, business and occupation of the Respondent. At the conclusion of Petitioner's testimony when Respondent moved for an involuntary dismissal and directed verdict, the Distri' Judge ruled that only one question was left open on this issue after Petitioner's admissions, that being, "whether claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done?" *Doane, et al v. E. I. DuPont deNemours & Co.* (C.A. 4th) 209 F. 2d 921.

It is well established under the applicable authorities that if the work in which Petitioner was engaged at the time of his accident and injury constituted a part of the business of

the Respondent, recovery is limited to the benefits provided by the Workmen's Compensation Act and this action at common law against the Respondent could not be maintained. *Marchbanks v. Duke Power Co., et al,* 190 S.C. 336, 2 S.E. 2d 825; *Kennerly, et al v. Ocmulgee Lumber Co., et al,* 206 S.C. 481, 34 S.E. 2d 792; *Boseman v. Pacific Mills,* 193 S.C. 479, 8 S.E. 2d 878; *Adams v. Davison-Paxon Co.*. 230 S.C. 532, 96 S.E. 2d 566.

The Respondent is a rural electric cooperative, organized under the provisions of the Rural Electric Cooperative Act of South Carolina (1952 Code of Laws for South Carolina, Chapter 15), and has, with its own employees and by contracts, let from time to time, constructed a large electric distribution system, with funds borrowed from the United States Government through the National Rural Electrification Administration. The construction and maintenance work, which Respondent has carried on in enlarging its distribution system, has been and is essential to the successful and proper operation thereof.

Under the provisions of the Rural Electric Cooperative Act of South Carolina, the Respondent is vested with the power, among other things, to generate, accumulate and distribute electric energy in rural areas to its members and to construct, acquire, maintain and operate electric generating plants, buildings and equipment and any and all kinds of property which may be necessary and convenient to accomplish the purpose for which it was organized. When the procedure is examined it becomes clear that the moving force and chief actor in the entire matter was the Respondent. The project was begun when Respondent secured a loan of $334,300.00 from the United States Government under the Rural Electrification Act of 1934, as amended, to finance certain construction work. Under the subject contract the construction was performed by R. H. Bouligny, Inc. including the portion on which Petitioner was working when he sustained his injuries. The evidence conclusively shows that the work being done was essential to and became an integral part of Respondent's electric distribution system. The Respondent carries on and has carried on

continuously, with its own employees, the construction of every type facility which has gone into and makes up its operating electric distribution system, including those constructed under the Bouligny contract. The construction work, in its various aspects and types, which is carried on and has been carried on by Respondent, goes hand in hand with the distribution and sale of its product, electric energy, each being essential and complementary to the other in such operation.

The Petitioner contends that the construction work, particularly of the sub-station he had climbed when his injuries occurred, was completely separate and distinct from Respondent's business, trade or occupation. He was not injured by the sub-station as it was not energized. The sub-station was merely serving as a platform which he had climbed and he was injured by the line on the outside of the sub-station. The contractor was constructing the line. However, in arguing negligence on the part of Respondent in the trial Court, the Petitioner contended a duty of performance on Respondent's part in connection with the particular work being done. Thus, he asserted that the construction work constituted an integral part of Respondent's business and that Respondent was required to and did participate in the work with its own employees. If Petitioner produced any evidence of negligence on the part of Respondent in connection with the work being done and as to what Respondent did or failed to do through its employees, at this particular place, it would necessarily follow that the work being done constituted part of Respondent's trade and business.

At the close of Respondent's testimony, the Petitioner elected not to offer any reply testimony and moved to strike Respondent's affirmative defense based upon the terms and provisions of the Workmen's Compensation Act constituting a bar to this action of Petitioner at common law. The District Judge ruled that the issue was one of law and granted the motion. Immediately thereafter the Respondent moved for a directed verdict and this particular affirmative defense was included as a grounds for the motion with the express permission of the Court. The District Judge took the erroneous

view that Respondent's construction work did not constitute a part of its trade and business because it did not perform such work by contract for third parties. He stated that in order to engage in the business it would be necessary to do that business for someone else. The Respondent's motion for a directed verdict was overruled and subsequent to the verdict of the jury in favor of the Plaintiff the Respondent moved for judgment non obstante veredicto in favor of the Defendant and in the alternative and reserving its position under such motion, then for a new trial. The District Judge denied both motions.

The issue here arose under the South Carolina Workmen's Compensation Law and must be determined by the provisions of that law. Under the terms of the Workmen's Compensation Act, where an owner undertakes work which is a part of his business, and contracts with another for the performance of that work, either in whole or in part, the owner is liable for the payment of compensation to any workman employed in the work to the same extent as if that workman had been immediately employed by him. (1952 *Code of Laws for* S. C., Section 72-111) The rights and remedies granted under the statute to an employee exclude all other rights and remedies of the employee as against his employer on account of injuries, and where an employee accepts an award under the statute, he is barred from proceeding further (Sections 72-121 and 72-123). The Court below concluded that the work performed by Bouligny under the contract was done in carrying on the trade or business of the Respondent and we submit that the evidence was susceptible of no other reasonable inference. It is obvious that the question presented did not raise an issue of fact for the jury but constituted a question of law for the Court. *Adams v. Davison-Paxon Co.*, (1957) supra. When Petitioner sustained his injuries he was working on facilities which were incorporated into and became a part of Respondent's business which was that of operating an electric distribution system. Try as he may, the Petitioner cannot get away from this fact. This was his work and the core of the whole matter is whether the work constituted a part of the Respondent's trade and busi-

ness and that it was, is plain and certain beyond any possible doubt.

The Petitioner states and repeats by innuendo and otherwise that the testimony of Respondent's Manager, Mr. A. J. Hurt, is unworthy of belief and seems to make this contention the basis of his claim to have the judgment of the Court below reversed. We submit that the testimony of Mr. Hurt is in the record for examination and Petitioner's attacks and charges are wholly without merit. His testimony was fully corroborated by Mr. E. V. McMahon, the Chief Engineer of the Southern Engineering Company, who supervised all construction work done by Respondent whether such work was done by its own employees or done by contract. The Petitioner offered no evidence to contradict Mr. Hurt's testimony or any part of it. When the District Court inquired of Petitioner's counsel if he had any testimony in reply, counsel answered that he did not know of any reply that was necessary and in spite of ample opportunity, Petitioner never proposed any testimony to contradict or rebut anything said by Mr. Hurt. Unfounded attacks and charges against a witness do not make an issue of fact or a question of law.'

Material facts in the case all point in the one direction, that Petitioner sustained his injuries while engaged in work which was part and parcel of Respondent's trade, business and occupation. The question of whether there is sufficient evidence to raise a question of fact to be presented to the jury is a question of law to be decided by the Court. Under this principle and under Rule 50(b) it is clear that the Court below had the power to set aside the verdict in the District Court and order judgment for the Respondent upon the grounds that its motion for a directed verdict and subsequently for judgment non obstante veredicto should have been granted. The Seventh Amendment to the Constitution preserves the right to a jury trial according to the rules of the common law but certainly does not guarantee trial by jury of questions of law which are to be decided by the Court. The issue of whether Petitioner's claim at common law against Respondent was barred by the provisions of the South Carolina Workmen's

Compensation Act constituted purely a question of law for the Court and under the aforementioned Rule 50 of the Federal Rules of Civil Procedure, it is not to be disputed that the Court below had the power and the authority to reverse the judgment of the District Court with direction to enter judgement for the Defendant. *Brunet v. S. 'S. Kresge* (C.A. 7th) 1941, 115 F. 2d 713, Certiorari Denied, 61 S. Ct. 1102, 313 U.S. 577, 85 L. Ed. 1535; 28 U.S.C. 2106 and 28 U.S.C.A. 2106.

The Petitioner in the Court below contended that the District Judge was correct in concluding as a matter of law that the provisions of the South Carolina Workmen's Compensation Act did not constitute a bar to his action. Upon Petitioner's making his motion to strike this defense, the Court inquired of his counsel about his testimony in reply. There was ample opportunity afforded Petitioner to offer testimony if he had any and he was warned as to the prospect of Respondent's motion for a directed verdict. Simultaneously, the Court ruled that it was a question of law and there was no conflict in the testimony. In these circumstances, we submit that the Petitioner has not been deprived of any rights to a jury trial nor was he deprived of any of his rights in the trial according to the Federal Rules of Civil Procedure. We submit that the decision of the Court below is not only an appropriate judgement but is one that was required by both the evidence and the law.

ARGUMENT

I

The Evidence Establishes that Petitioner sustained the injuries of which he complains while engaged in work which constituted a part of Respondent's trade, business or occupation and his recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina.

The Petitioner got his case submitted to the jury in the District Court on the theory that Respondent could not divorce itself from part of its construction work, by having the same done by contract, for the reason that such work constituted such an essential and integral part of its business operations that it could not be separated; that for the safety of the contractor's employees, it was Respondent's duty to inspect their work as the same progressed, constantly and continuously and with its own employees; that it was Respondent's duty to post red danger signs at all points where the lines were energized during the construction period so that the contractor's employees would be aware of the hazard which they were creating for themselves.

Petitioner's position was and is that he was entitled to recover against Respondent under the common law, on the ground that Respondent was carrying on the construction work as a part of its business and its negligence in the conduct of such work was the proximate cause of his injury, and that he was not restricted to relief under the South Carolina Workmen's Compensation Law, because Respondent was not carrying on the construction work, in connection with which he sustained his injury, as a part of its business. We beg to repeat there what has often been quoted, "Oh, consistency, thou art a jewel!" It is impossible to reconcile the propositions contended for by Petitioner, namely, that Respondent was carrying on construction work, as a part of its business and that it was not carrying on construction, as a part of its business, at one and the same time. If Petitioner established by his proof that his injury resulted from Respondent's negligence in carrying on its con-

struction work, he necessarily established by such proof that his remedy was under the South Carolina Workmen's Compensation Law, not under the common law.

The Petitioner contends that the construction work, particularly of the substation he had climbed and the hot line he contacted, were completely foreign to and wholly divorced from Respondent's business, trade or occupation but in arguing negligence they contended a duty of performance on the part of Respondent in connection with the particular work being done. Petitioner contended that Ira Moss (Respondent's lineman assigned to this phase of the work to cut the energy off where requested) was there and should have observed the work that was done and was directed to see that the line was inspected (R. 8-11). Thus if Petitioner presented any evidence of negligence on the part of Respondent in regard to what it did or failed to do through its employees, at the subject time and place, it necessarily follows that such was directly involved with Respondent's participation under the construction contract in the work being done.

During the trial the District Judge ruled that only one question was left open after Petitioner's admissions, that being, "Whether claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done?" (R. 20-22). *Doane, et al v. E. I. DuPont deNemours & Co.*, (C.A. 4th) 209 F. 2d 921. The most pertinent sections of the South Carolina Workmen's Compensation Act (1952 *Code of Laws,* Title 72) are set forth at the beginning of this brief under Statutory Provisions Involved. The admissions by Petitioner were that Respondent, Blue Ridge Rural Electric Cooperative, Inc., and the contractor, R. H. Bouligny, Inc., were duly filed and operating under the Act; that the Petitioner elected to receive and accepted full benefits provided by the compensation law and it was further admitted that Respondent did occupy the status of owner under the Act, provided the work being done when Petitioner's injury occurred constituted a part of the trade, business and occupation of Respondent. (R. 3,4).

It is well established that the leading case and recognized authority on this issue in South Carolina is *Marchbanks v. Duke Power Company, et al*, 190 S.C. 336, 2 S.E. 2d 825. In that case the South Carolina Supreme Court held that maintenance of the power lines and poles of the power company was an important part of its trade and business; and that the employee of a paint contractor engaged by the power company to paint its poles, and injured while so engaged, was in the trade business or occupation of the company; that the remedy of such employee was under the Workmen's Compensation Act and he could not maintain a common law action against the power company for the injuries sustained.

In *Kennerly, et al v. Ocmulgee Lumber Company, et al*, 206 S.C. 481, 34 S.E. 2d 792, the South Carolina Supreme Court cited *Marchbanks v. Duke Power Company, et al*, supra, with approval and quoted therefrom as follows:

> "'After all, we are governed by the Act of our own State. It behooves us then to consider it and determine what that Act means, and to that end we must determine the intent of the Legislature, as it is disclosed by the language used in the Act. It is our task to discover the sense in which the words were used when the section was passed. * * *
>
> "'To us the plain interpretation of this language is that the lawmakers intended the term "owner" to be synonymous with the principal contractor, that is to say the party of the first part to the contract with the "subcontractor" who is the second party to the contract for the execution or performance of the work to be done by the owner. The primary purpose of a workmen's compensation act is to protect the workman who actually does the work. It is easily conceivable that a contractor or subcontractor other than the owner may let a part of the work to be done to others who are financially irresponsible and that the employee of such contractor or subcontractor who is injured while doing the work is left without remedy. *It is the clear purpose of the Act to make the "owner," the person who is interested in having the work done, liable to the employee so injured.*" (Emphasis ours)

The opinion of the then Circuit Judge (now Supreme Court Justice), Honorable G. Dewey Oxner, was reported in full in *Marchbanks v. Duke Power Company, et al*, supra, and from this opinion we quote the following:

> "The best reasoned case that I have found on this question is that of *State v. Benjamin F. Bennett Bldg. Co.*, 154 Md. 159, 140 A. 52, 53. It involves an act similar in principle to that of this State. The court, in referring to the section analogous to our Section 19, said:
>
> 'The effect of this provision, when brought into operation through the designated state of circumstances, is to impose the absolute liability of an employer upon the principal contractor when he was not in law the employer of the injured workman. The result, then, is that, where the prescribed conditions exist, the principal contractor becomes by the act the statutory employer of any workman employed in the execution of the work. * * *
>
> 'This primary liability so imposed by statute upon the principal contractor is not based upon contract, since the legislation is predicated upon the fact that no contractual relation, as master and servant, exists between the principal contractor and the workman; nor does it flow from a breach of duty, because the liability arises independently of the existence of fault on the part of the principal contractor. This legislation, however, finds its constitutional support in the consideration that the general welfare is promoted and conserved by requiring the employer and the workman to yield something of their respective rights toward the establishment of a principle and plan of compensation for their mutual protection and advantage. * * * The reasons for the enactment of this section of the act, and some of its advantages to the workmen, have already been noted in this opinion, and its corresponding special benefits to the principal contractor are that, with the imposition of a new statutory liability to a class of workmen who are not his servants, he is yet relieved of any liability at common law to any member of this class injured in the course of his employment within the act through the negligence of the principal contractor; and that, unless the

injury to the workman be through the principal contractor's neglect, the latter may recover against the subcontractor the compensation paid. If these beneficial provisions did not exist in favor of the employer, the section here under consideration might be difficult to support on constitutional grounds.'

"The Court then concluded: 'This theory would deprive a class of employers within the act of their exemption from all liability save that of compensation, which is an essential part of the general legislative plan. A construction so antagonistic to the fundamental principles underlying the enactment will not be adopted. If an employer is within the act to bear its liabilities, he must remain to be accorded its immunities, in the absence of a clearly expressed legislative intention to the contrary.'"

The Petitioner relies upon the case of *Sears Roebuck & Co. v. Wallace*, (C. A. 4), 172 F. 2d 802, where a corporation engaged in the sale of merchandise contracted with a builder to make certain alterations in a storage warehouse. It was held that the alteration of the building was not a part of the business of the occupant and thus the occupant was not obliged to provide compensation for the employees of the subcontractor, but was a stranger to the latter's business. We do not think the *Sears & Roebuck* case could be considered analogous to the present case for the reason that under no circumstances could the Respondent be considered a stranger to the work being done under its contract with the Bouligny Company at the time of the injury to Petitioner. Also, Petitioner relies upon *Miles v. W. Virginia Pulp & Paper Co.*, 212 S.C. 424, 48 S.E. 2d 26 where the owner of a pulpwood plant engaged a contractor to supply him with pulpwood on a commission basis which we submit is not applicable here.

In construing a provision of the Virginia Workmen's Compensation Statute similar to the subject provision of the South Carolina statute, it was held in *Doane, et al v. E. I. DuPont deNemours & Co.*, supra, that the purpose of the Virginia statute is to limit the recovery of all persons engaged in the business under consideration to compensation under the Act and to deny any injured person the right of recovery against any

other person unless he be a stranger to the business. We think it was firmly established that the work being done in the present case at the time Petitioner sustained his injuries was part and parcel of Respondent's trade, business and occupation.

The following cases support the position of the Respondent: *Boseman v. Pacific Mills*, 193 S.C. 479, 8 S.E. 2d 878; *Fox v. Fafnir Bearing Co.*, 107 Conn. 189, 139 A. 778; *Kennerly v. Ocmulgee Lumber Co.*, 206 S.C. 481, 34 S.E. 2d 792; *Continental Casualty Co. v. Haynie et al*, 182 Ga. 60, 186 S.E. 683; *Lee v. Claxton*, 70 Ga. App. 226, 28 S.E. 2d 87; *Sherlock v. Sherlock*, 112 Neb. 797, 201 N.W. 645; *Olsen v. Canter*, 93 Ind. App. 150, 176 N.E. 27; *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 153 S.E. 591; *Isthmian S. S. Co. of Delaware, v. Olivieri, et al*, (CCA 5th) 202 F. 2d 492; *McDowell v. Stilley Plywood Co., et al*, 210 S.C. 173, 41 S.E. 2d 872; *Hopkins v. Darlington Veneer Co., et al* 208 S.C. 307, 38 S.E. 2d 4; *Purkable v. Greenland Oil Co.*, 122 K. 720, 253 Pac. 219; *Berry v. Atlantic Greyhound Lines, Inc.* (C. A. 4th) 114 F. 2d 255, 30 F. Supp. 188.

In *Smith, et al v. Fulmer, et al*, 198 S.C. 91, 15 S.E. 2d 681, the South Carolina Supreme Court stated:

> "It seems to us that the true test is: Was the employee doing something for the subcontractor which bore some reasonably direct relation to the performance 'of the work undertaken' by the contractor? The subcontractor, Sherard, simply stepped into the shoes of Fulmer with reference to the work of making the fills and laying the concrete paving. We think the admitted facts demonstrate that Smith, the deceased employee, was employed in the work which Sherard had agreed to perform for Fulmer, and hence under the terms of the statute Fulmer is liable just as if Smith had been immediately employed by him, for he was actually doing something which was essentially related to the fulfillment of the contract made by Fulmer with the State Highway Department."

A. The decision of the Court below that the work performed by the Bouligny Company under the contract was done in carrying on the trade or business of the Respondent was conclusively supported by the evidence.

We submit that the reversal by the Court below of the District Court's dismissal of the affirmative defense is not in conflict the decision in *Galloway v. U. S.*, 319 U.S. 372, 63 S.Ct. 1077, but on the contrary, if the decision is applicable, it sustains the position of Respondent. Also, the mention of the "scintilla" rule by Petitioner is not to be considered here.

The District Judge ruled that the issue was one of law and Petitioner did not disagree with this until the time of his Petition for rehearing in the Court below. In *Adams v. Davison-Paxon Company*, 230 S.C. 532, 96 S.E. 2d 566, in an opinion by Chief Justice Stukes, the South Carolina Supreme Court held,

> "It has been consistently held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision by the court, which includes the finding of the facts which relate to jurisdiction. *Knight v. Shepherd*, 191 S.C. 452, 4 S.E. 2d 906; *Tedars v. Savannah River Veneer Company*, 202 S.C. 363, 25 S.E. 2d 235, 147 A. L. R. 914; *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E. 2d 872; *Miles v. West Virginia Pulp & Paper Co.*, 212 S.C. 424, 48 S.E. 2d 26; *Watson v. Wannamaker & Wells, Inc.*, 212 S.C. 506, 48 S.E. 2d 477; *Gordon v. Hollywood-Beaufort Package Corp.*, 213 S.C. 438, 49 S.E. 2d 718; *Holland v. Georgia Hardwood Lbr. Co.*, 214 S.C. 195, 51 S.E. 2d 744; *Younginer v. J. A. Jones Const. Co.*, 215 S.C. 135, 54 S.E. 2d 545; *Horton v. Baruch*, 217 S.C. 48, 59 S.E. 2d 545."

In the case at bar, at the close of all the testimony, the District Judge ordered Respondent's affirmative defense, that Petitioner's action was barred under the provisions of the South Carolina Workmen's Compensation law, stricken on the ground that Respondent is not a contractor, contracting to construct substations and the like for others (R. 48-52). Immediately fol-

lowing the ruling on the motion to strike, the Respondent moved for the direction of a verdict and included as one of the grounds, with the Court's permission, that Petitioner's action was barred by the South Carolina Workmen's Compensation law. Without discussing the motion, the Court overruled it, obviously overruling the defense here under consideration on the same ground that he had granted Petitioner's motion to strike. In passing on the motion to strike, the Court said:

> " . . . I am talking about the defendant in this case, it seems to me that the business they engage in is selling electricity. They are not in the contracting business. They don't go build substations for Gaffney, Newberry and somebody else, do they?" (R. 49). * *
> " . . . My idea of engaging in business is to do something for somebody else. What they are doing—and everything they do about repairing lines and building substations, they do it for themselves. To engage in the business is doing something for somebody else. How can you do business with yourself?" (R. 51).

The basis on which the Trial Judge granted Petitioner's motion to strike and on which he overruled Respondent's motion for the direction of the verdict is not made the test in any of the decisions. As a matter of fact, if such were made the test, all of the decisions touching the matter would have to be overruled.

The case of *Clarence Hudson v. Horry Electric Cooperative, Inc.*, is strikingly similar to the case at bar. This was an action brought in the Court of Common Pleas for Horry County, South Carolina and the decision is not reported. The decision was recorded on September 28, 1957 by Judge Gordon Badger Baker a distinguished South Carolina jurist, the son of Mr. Justice D. Gordon Baker, who served as Chief Justice of the South Carolina Supreme Court for many years. For the convenience of this honorable Court and if the Court desires to read this decision, the Referee's Report, the Court's Decree and the Order dismissing an appeal to the South Carolina Supreme Court are printed as an appendix to this brief. In this case the plaintiff was the employee of an independent contractor, which

contracted to construct 27.38 miles of new lines and 62 miles of conversion lines for the defendant, the cooperative, and the employee sustained personal injuries in connection with the work. The cooperative and the independent contractor were both covered by and operating under the provisions of the South Carolina Workmen's Compensation law when the accident occurred. The workman was paid compensation benefits for his injuries by the contractor under the South Carolina Workmen's Compensation law. He then brought an action against the cooperative alleging that his injuries resulted from its negligence. The cooperative answered, alleging that the injuries were sustained while he was engaged in the work which constituted a part of its trade and business and that his sole and only remedy against it was under the provisions of the South Carolina Workmen's Compensation law and that he had already been compensated under the said law for his injuries and that his action was accordingly barred. The cooperative was organized under "The Rural Electric Cooperative Act of South Carolina" in 1940. It took over 198.38 miles of lines serving 753 consumers, from the State Rural Electrification Authority and commenced operating. Immediately following its organization, it commenced and continuously carried on thereafter a construction program, doing part of the work with its own employees and part by special contracts. The contractor installed between 130 and 140 transformers along with its work and the cooperative installed about 600 in connection with its work. The workman was injured on a line while installing one of the transformers. At the end of 1956, the cooperative had 1590 miles of lines in its electric distribution system, serving 7,400 members. The Court held that the workman sustained his injuries while engaged in work which constituted a part of the cooperative's trade and business and that his exclusive remedy was under the South Carolina Workmen's Compensation law and that accordingly, his action was barred.

The facts in the evidence in this case lead to the inescapable conclusion that Petitioner sustained his injuries while engaged in work which constituted a part of Respondent's trade and business. Under the provision of "The Rural Electric Co-

operative Act of South Carolina" (1952 Code of Laws for South Carolina, Chapter 15) Respondent is vested with the power among other things, to generate, accumulate and distribute electric energy in rural areas to its members and to construct, acquire, maintain and operate electric generating plants, buildings, and equipment and any and all kinds of property which may be necessary and convenient to accomplish the purposes for which it was organized. During the period of its existence, Respondent has exercised the powers given it under the Act.

The Record discloses that within the short space of 15 years, Respondent with its own employees and by special contracts, let from time to time, constructed a total of approximately 1700 miles of lines and appurtenant facilities to serve approximately 9,700 consumers. In addition and at the same time, it carried on all of the maintenance, conversion and rehabilitation work required in its system.

Materials and facilities used in an electric distribution system are rather short-lived and especially so if the system is experiencing rapid growth. For example, although Respondent had been operating only about 12 years when the Bouligny contract was let, nevertheless, that contract called for the conversion, re-phasing and rehabilitation of 87.7 miles of existing lines, 2 appurtenant substations, a breaker station and only 24.2 miles of new transmission and distribution lines. Within the period, it built 3 substations, which had either been rebuilt or had been abandoned at the time of the trial. Thus, the Record discloses that Respondent's electric distribution system, construction, maintenance, conversion, rephasing, rehabilitation and other like work, is a continuous operation. Each facility, constituting a part of the system, is indispensable to its operation, the substations, the transformers and all other like facilities. With its own employees, it has carried on every type of construction involved in building its distribution system and called for under the Bouligny contract.

With respect to the evidence in the case, Petitioner argues that facts, which are found in it, should be treated as not being in it, because he thinks it is possible to give two interpretations to part of them. He argues that all evidence touching an issue

should be disregarded if some part of it is capable of two interpretations, even by forced inference. He argues that testimony of witnesses should be disregarded, if other witnesses could have been produced but were not, who could have testified as to the same facts, or to some part of them. He would substitute inference for proven fact and would have speculation overriding positive proof. He seeks to rely upon forced and violent inference from the evidence, not upon the facts as they appear in it. He would withdraw evidence from the Record rather than construe it as found therein. He would substitute prejudice for fact, innuendo for proof. The attack upon a witness is one thing; its justification, quite another. The authorities, cited for his propositions, do not support them. He argues that the frequency with which Respondent constructs a particular type facility in its system and its technical character determine whether its construction constitutes a part of its business. Transformers are installed in the system by hundreds, substations by ones and twos. Each of the designated facilities is indispensable in operating its system. Each has to do directly with the transmission of electric energy to its members. He would argue that the installation of the transformers, except perhaps the very largest ones, would constitute a part of its business, but that the installation of the very largest transformers and the construction of substations would not constitute a part of its business. There is no authority in the decisions for such propositions. Such rule, if one there were, would not only be illogical, but would be impossible of definition and of application.

If the forced and violent inference from the facts of the evidence, contended for by Petitioner, were allowed, the fact would still remain that substations constitute a vital and integral part of the Respondent's electric distribution system and that their construction constitutes a necessary and essential part of its business. Whether Respondent, if its own employees constructed only 3 substations and, whether they were in use at the time of the trial in District Court is of no consequence as to the issue here involved, in the light of all of the other evidence in the case. If Respondent had never constructed a sub-

station with its own employees, it would still follow under the facts of the case, that the construction of its substations constituted a part of its business.

Boseman v. Pacific Mills, supra, involved the deaths of two employees of an independent contractor who had contracted to paint the water tank of a textile mill. Although the mill always contracted for this specialized work and never did it by its own employees, the South Carolina Court held that the work was an integral part of the business of the mill and that the dependents of the deceased workmen were entitled to payment by the mill of Workmen's Compensation benefits. It is to be noted that the employees of the independent contractor were doing work on a stand-by facility, not on a facility involved in the manufacturing work of the plant. The manufacturing processes could have gone on without the facility which was required only to protect the processing equipment against fire.

The facts in the case at bar present a much stronger case. Here, Respondent serves its consumers electric energy through the substation which was under construction. The substation is not a stand-by facility to protect the system against an emergency and contingency. If a substation were a non-electric, unrelated facility, it would be of no comfort to Petitioner under the facts of the present case. He was not injured by the substation. It was not energized. The substation was merely serving as a platform or support for Petitioner when he was injured by reaching to an energized line outside the substation. The contractor was constructing the line. It had been fastened to insulators on the outside of the substation and this line was not completed until it was connected inside of the substation. That is what the Petitioner was attempting to do at the time of his injury, i. e., he was measuring a piece of line in order to make the connection from the line connected to the insulators on the outside of the substation to a point on the inside of the substation. The hot line contacted by the Petitioner had been newly constructed for Respondent by the Bouligny Company under the same contract that included construction of the substation. It is apparent that Petitioner would have received the same injury if he had climbed a pole to reach the

wire. In either event and however the facts of the accident may be viewed, the work being done was an integral part of the trade, business and occupation of the Respondent.

B. The testimony of A. J. Hurt and E. V. McMahon.

In his brief the Petitioner asserts, re-asserts, repeats, charges and re-charges, by innuendo and otherwise, that the testimony of Respondent's manager, A. J. Hurt, is unworthy of belief. That is made the basis of his claim to have the judgment of the Court of Appeals reversed. If making and repeating a charge could prove it, Petitioner would accomplish his purpose. Fortunately for the attacked witness, the Record in the case is before the Court and we welcome and invite an examination of it for the facts. It will be found that the vicious attack upon him is wholly unwarranted and that it is most unjust. This is what the record shows:: On March 11, 1955 prior to the trial in the District Court Mr. Hurt's deposition was taken by Petitioners' counsel at Anderson, South Carolina. Later, the same counsel again took his deposition at Pickens, South Carolina. The witness was asked over and again what precautions he or the Respondent took for the safety of the employees of the contractor working on the project on which Petitioner was injured. Respondent's counsel concluded that the witness was being harassed by vexatious repetitions and instructed the witness not to answer. The Petitioner's counsel threatened to petition the Court for an order requiring the witness to answer but no such petition was ever made to the Court. On the trial of the case while Petitioner's testimony was being presented, portions of Mr. Hurt's deposition were offered in evidence including the colloquy with respect to the foregoing. Mr. Hurt was then called to the stand and the same question was put to him and he answered promptly and properly (R. 17). From what was said in connection with the reading of the deposition, the District Judge apparently gathered the impression that the witness refused to answer a question of his own accord and without cause and thereupon he took precipitant and impulsive action against the witness which we think was unjustified (R. 17-18). The witness answered "Mr. Edens, the contract

speaks for itself," and we submit that this answer was responsive to the question which was asked him. It was a truthful, honest and proper answer.

The contract between Respondent and the Bouligny Company spelled out in great detail the precaution required by Respondent to be taken for the safety of the workers. It provided that the contractor should employ on the project competent, experienced and reliable foremen, such skilled workmen as should be necessary for the various classes of work to be performed and a competent superintendent who should be present at all times during working hours where construction was being carried out; that the contractor should not at any time or under any circumstances cause or permit any of its employees to perform any work upon energized lines, or upon poles carrying energized lines; that the contractor should at all times take all reasonable precautions for the safety of its employees on the work and of the public; that it should comply with all applicable provisions of Federal, State and municipal safety laws and building and construction codes; that all of its machinery and equipment and other physical hazards should be guarded in accordance with the "Manual of Accident Prevention in Construction" of the Associated General Contractors of America; and that sufficient, safe, cool drinking water and an adequate first aid kit should be provided on each of its work trucks and that adequate safe equipment and construction tools should be provided for its workmen.

Naturally, Mr. Hurt could not enumerate from memory the requirements set out in the contract for the safety of the contractor's employees. Therefore, he gave the best answer he knew by suggesting a reference to the contract itself for its terms. The Petitioner made the same attack on the witness in the Court below that is made here. Exception was taken to the trial Court's action in threatening to adjudge the witness in contempt but, since the Court below ordered entry of judgment for Respondent on the basis of its legal defense, it did not become necessary for the Court below to pass on the exception.

and voluminous. Before the trial he read it and was familiar with it. His counsel suggested that he read it and he did so. There was certainly nothing wrong about this. On cross-examination counsel continuously asked him confusing questions as to what he knew under the contract then, as compared to what he did not know about it and in connection with it on deposition. What he knew about the contract on trial and failed to know about it on deposition has no bearing on the issue here as to whether Petitioner sustained his injuries while engaged in work which constituted a part of Respondent's business.

When Petitioner's questions are examined in the light of the Record and of the basic issue involved, they are found to be wholly without merit. Unfounded attacks and charges do not make an issue of fact or a question of law. Further, the U. S. Constitution does not guarantee trial by jury of questions of law which are to be decided by the Court and only questions of fact are to be decided by a jury. In *United States v. Standard Oil Company of Indiana, et al* (Ex parte United States), 101 F. 2d 870 at page 878 the Court said:

> "In the absence of prohibitive legislation courts have inherent power to provide themselves with appropriate procedures required for the performance of their tasks. Ex parte Peterson, 253 U. S. 300, 312, 313, 40 S. Ct. 543, 64 L.Ed. 919; Funk v. U. S., 290 U. S. 371, 381-384, 54 S. Ct. 212, 78 L. Ed. 369, 93 A.L.R. 1136. As we have already seen, the constitutional guaranty does not in this case stand in the way of doing after trial what could have been done at the trial. There has been no encroachment on the proper province of the jury. The essence of legal power is to take the case away from the jury, where there is an insufficiency of evidence to sustain a conviction. The power to direct a verdict and the power to render a judgment of dismissal pursuant to the reservation of the legal question are clearly incidental to, and necessarily flow from, the judicial function of determining the legal sufficiency of the evidence."

While the Seventh Amendment to the Constitution pre-

serves the right to a jury trial according to the rules of the common law, it is well established and fundamental that, although questions of fact must be decided by the jury and may not be re-examined by the Court, the question whether there is sufficient evidence to raise a question of fact to be presented to the jury is a question of law to be decided by the Court. In the Federal Rules of Civil Procedure under Rule 50 there is provided a procedure for the determination of this question of law by the Federal Courts. Rule 50 (a) provides for a motion for a directed verdict at the close of the evidence, before the case is submitted to the jury. It enables the Court to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous as a matter of law. Rule 50 (b) authorizes the Court to reserve the decision of this question of law until after the case has been submitted to the jury. If the Court decides that a verdict should have been directed, it may set aside the verdict of the jury and enter a judgment notwithstanding the verdict. Rule 50 (b) also authorizes a motion for a new trial in the alternative. It is well established that the sufficiency of the evidence is not reviewable on appeal unless a motion for directed verdict was made in the trial Court as was done in the present case with the subsequent motion for judgment notwithstanding the verdict being made in due time. We respectfully submit that if an appellant unsuccessfully moves for a directed verdict and for a judgment notwithstanding the verdict in the trial Court, the Court of Appeals, in reversing the judgment, has unquestioned power to order the entry of judgment non obstante veredicto. In *Brunet v. S. S. Kresge Co.*, C.C.A. 7th, 1941, 115 F. 2d 713, certiorari denied 61 S. Ct. 1102, 313 U. S. 577, 85 L. Ed. 1535, where reviewing court vacated judgment for plaintiff on ground of insufficiency of evidence, action of court in reversing and remanding with directions to dismiss on the merits, without remanding for a new trial, did not deny plaintiff the constitutional right to trial by jury, where, within ten days after reception of verdict for plaintiff, defendant filed motions, one to set aside the verdict and for a new trial, and the other

to set aside the verdict and enter judgment notwithstanding the verdict, and both were denied and judgment entered on the verdict, since, by such action defendant reserved its right under subdivision (b) of this rule relating to reservation of a decision on a motion for a directed verdict so that it was entitled to direction of judgment without a new trial.

In *Lowden v. Denton*, C.C.A. Mo. 1940, 110 F. 2d 274, certiorari denied, 60 S. Ct. 1100, 310 U.S. 652, 84 L. Ed. 1417, it was held that a railroad was entitled to direction for judgment of dismissal on the merits when Circuit Court of Appeals reversed judgment against railroad on ground of absence of evidence of negligence, notwithstanding motion for directed verdict was denied without reservation, since under this rule trial court was deemed to have submitted the action to jury subject to a later determination of legal questions raised by motion for directed verdict, and hence express reservation was unnecessary.

Also, in *Home Life Insurance Co. of New York v. Moon*, C.C.A. W. Va. 1940, 110 F. 2d 184, certiorari denied 61 S. Ct. 15, 311 U.S. 659, 85 L. Ed. 422, rehearing denied 61 S. Ct. 129, 311 U.S. 726, 85 L. Ed. 473, and 61 S. Ct. 173, 311 U.S. 728, 85 L. Ed. 474, rehearing denied, 62 S. Ct. 298, 86 L. Ed. 568, it was held that under Rule 50 (b) when Circuit Court of Appeals believed that the evidence justified only one reasonable inference, that insured's death was due to suicide, and defendant had moved for a directed verdict and for judgment notwithstanding the verdict, court should remand actions for double indemnity under life policies and on accident policy, with directions to set aside judgments for beneficiary and to enter judgment for insurer.

Petitioner asserts that the witness sought to create the impression on direct examination that Respondent constructed three substations with its own employees, which were in use at the time of the trial. Here is what the witness testified with respect to the matter (R. 31):

> "Q. Does the Cooperative construct substations with its own employees?
> "A. Yes, sir, we have constructed substations.
> "Q. Have any been constructed by its own employees similar to the one near Walhalla that has been under discussion in this case.
> "A. Yes, sir, we have built substations of that nature.
> "Q. Do you recall how many substations the Cooperative has built with its own employees?
> "A. Yes, sir, we built three."

On cross-examination, when the witness was asked to identify the substations which Respondent built with its own employees, he did so without the slightest hesitation. Every question put to him was answered promptly, courteously, and to the best of his ability. No witness can do more.

When Mr. Hurt's deposition was taken he had not read the contract between Respondent and R. H. Bouligny, Inc. and accordingly was not familiar with its terms. Before the trial of the case in District Court, he read the contract and acquainted himself with its provisions. He is criticized for this. On cross-examination he was asked questions about what he had said on deposition when he was not familiar with the contract. Certainly these questions could have been confusing to the witness but at all times his answers were truthful and forthright, courteous and direct. He did not go into the field and familiarize himself with the details of work done under the contract. He is criticized for that although his work as manager was an administrative position. It was not his duty to check on the contractor's work as that was the duty of Southern Engineering Company. Mr. Hurt did not personally investigate Petitioner's accident and report it to the South Carolina Industrial Commission. He is critized for this. Petitioner was working under

the contractor and his accident was reported to the South Carolina Industrial Commission and he received compensation in the maximum amount allowed by law.

The Petitioner offered no evidence to contradict Mr. Hurt's testimony or any part of it. When the District Judge queried his counsel about testimony in reply, counsel stated that he knew of no evidence (R. 48).

Mr. Hurt's testimony was fully corroborated by E. V. McMahon, the Chief Engineer of Southern Engineering Company, who supervised all construction work done by Respondent whether done by its own employees or done by contract. There can be no doubt from his testimony that the Respondent performed all the types of construction work that were done under the Bouligny contract. He mentioned that the construction superintendent for Respondent drew the specifications for the double circuit distribution system leading out of the Pickens substation, which was constructed under this same contract with Bouligny. The Petitioner would contend that most of the construction work performed by Respondent was related to the construction of new lines. Surely most of the construction work required would be for new lines and the appurtenances incidental thereto. Mr. McMahon's testimony is firm and clear that the work being done including the construction of the Walhalla substation and the line connecting thereto which Petitioner contacted was all a part of the trade and business of the Respondent and such work including the engineering was done under his supervision.

C. The construction contract by the Respondent and R. H. Bouligny, Inc., Defendant's Exhibit "C"

In this case all the work being done by the Bouligny Company was under the one contract which covered new lines, conversion of lines and substations. These things are integrated and cannot be separated into different catagories as far as the trade and business of the Respondent may be concerned. Two types of line construction were provided for under the contract: one was the construction of new lines; the other was the re-working of lines which were in use serving Respondent's con-

sumers and referred to in the contract as conversion. According to the uncontradicted testimony of the witness McMahon, the wire contacted by Petitioner was a part of the Ebenezer line and was covered by the portion of the contract calling for conversion. If this construction work performed under the contract could not be carried on for Respondent without its active participation therein, it must follow that such construction work constituted a part of Respondent's business, trade and occupation. According to the terms and provisions of the contract, the Respondent was the owner and the Bouligny Company was the contractor. The Record establishes that Respondent was the owner of the land upon which the substation was being constructed and furnished the materials to the contractor to be assembled together for the substation.

It would appear from Petitioner's brief that he would now attempt to question for the first time whether Respondent was the "owner" in these circumstances and as would be required for the South Carolina Workmen's Compensation law to apply. It is clear from the Record and particularly the conference before the District Judge immediately preceding the trial that all issues were stipulated with regard to the position of Respondent under the Workmen's Compensation Act and as agreed before the Court, the only question was "In the meaning of the Workmen's Compensation Act, was the Plaintiff the employee of Blue Ridge Electric" (R. 4). *Kennerly, et al v. Ocmulgee Lumber Co., et al,* 206 S. C. 481, 34 S. E. 2d 792.

It is obvious that the main actor in the whole enterprise was the cooperative, the Respondent herein. This is seen clearly when we view the whole picture of what was done in the formation and performance of the Bouligny contract. The project was begun when Respondent secured a loan of $334,300.00 from the United States Government under the Rural Electrification Act of 1934, as amended, to finance certain construction work. The lines to be constructed were to be located along such routes as the owner with the approval of the administrator should designate. Then Respondent entered into an engineering service contract with the Southern Engineering Company, whereby the engineer agreed to render the engineer-

ing services necessary for the design and construction of the project. This contract provided for the preparation of plans and specifications by the engineer, the approval thereof by the owner, the selection of a contractor by competitive bidding, the staking of the project by the engineers after the procuring of the rights-of-way and easements by the owner, and the supervision by the engineer of all the details of the construction work as the representative of the owner. This was pointed out by the Court below with the fact that the construction contract with the Bouligny Company conformed to the requirements of the loan agreement. All of this is succinctly stated in the opinion of the Court below as follows:

> "It (the contract) defined the Engineer as one employed by the owner with the approval of the Administrator to supervise the construction of the project; it authorized the owner, acting through the Engineer with the approval of the Administrator from time to time to make changes in the plans and specifications; it subjected the manner of construction and all materials and equipment used therein, to the inspection and approval of the Engineer, and it required the contractor to maintain an office for the Engineer on the site to facilitate the work of supervision. The contractor agreed to furnish the materials according to the specifications at agreed prices; but the contract showed that the materials of which the sub-stations were to be constructed were purchased by the Cooperative. The Cooperative assumed the responsibility and agreed to perform the service of de-energizing and re-energizing existing lines during the progress of the work."

The Petitioner relies upon the case of *Ballard v. Southern Cotton Oil Co.* (D.C. S.C.) 145 Fed. Sup. 882, by now contending that even if the work in which he was engaged when he was injured was a part of the trade or business of Respondent, he is not precluded in the present action because the Bouligny Company paid the compensation award and hence the acceptance of the award does not bar his suit under the provisions of Section 72-123 of the Workmen's Compensation statute. The

Court below recognized that the point was being raised for the first time in that Court because in the District Court the Petitioner conceded that he had no case if the work being done was a part of the trade or business of the Respondent. Although the point was raised for the first time on the appeal, it was considered by the Court below which held that the contention could not be sustained. *State v. Bennett Building Co.*, supra. The Court below concluded it was impossible to follow this decision by District Judge Timmerman since it was apparent that the decision was in direct conflict with the decision of the Supreme Court of South Carolina in *Marchbanks v. Duke Power Co.*, supra. We further submit that the decision is clearly contrary to the South Carolina law declared in the case of *Adams v. Davidson-Paxon Co.*, supra.

In holding that this contention of the Petitioner could not be sustained, the Court below said:

> "It involves the erroneous assumption that although the statute imposes the absolute liability upon the owner of the business to provide compensation, usually effected by carrying insurance for the employees of the individual contractor, the owner loses the off-setting benefit of immunity from suit at law provided by the statute, if the injured workman elects to receive compensation from the contractor. It is generally held under statutes of this kind that both the owner of the business and his individual contractor or the princi-al contractor and his sub-contractor, where they are parties concerned, are exempt from suit."

D. The Statute under which the Respondent was organized and operating.

The Respondent was incorporated pursuant to a special statute of the South Carolina Legislature. (1952 Code of Laws for S. C., Chapter 15, Rural Electric Cooperative Act) and Section 12-1025 (5) (8) (10) (11) (See Statutory Provisions Involved) expressly provides for Respondent to undertake and perform the exact type of work that was being done when Petitioner received his injury. Under the subject contract the Bouligny Company was constructing and converting lines and

building appurtenant substations and such work falls directly under the powers of the Appellant as described in the statute. The making of the contract and the performance of the work thereunder constitutes substantial evidence that Respondent was exercising the powers which it was expressly authorized by statute to perform.

The Petitioner cites the case of *Benbow v. Edmunds High School*, 220 S.C. 363, 67 S.E. 2d 680 which we submit is not applicable. In this case the South Carolina Supreme Court held that the workman was not covered under Section 72-111 while engaged in minor electrical repairs in a school building upon the ground that he was a casual employee. In the last paragraph of the opinion, the Court states: "The foregoing conclusion renders it unnecessary for us to determine whether the work being performed by Rhame was a part of the 'trade, business or occupation' of the Edmunds High School."

In 1936 the United States Congress passed an Act creating the National Rural Electrification Administration and authorizing the Administrator thereof, from funds appropriated under the Act, to make loans for rural electrification to Rural Electric Cooperatives "for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas" who were not receiving central station service.

As of December 31, 1956, the Administrator had approved distribution system construction loans under the act amounting to $2,647,764,122 to finance an estimated 1,446,484 miles of line and other facilities to serve an estimated 4,793,990 farms and other rural establishments. "1956 Annual Statistical Report U. S. Department of Agriculture, Rural Electrification Administration" of which the Court will take judicial notice. *Tolfree v. Wetzler*, (C.A. 3rd.) 22 Fed. 2d 214.

It would, we submit, be a legal anomaly for the Courts to hold that, although the rural electric cooperatives have carried on and are carrying on this mammoth construction program, nevertheless, the construction does not constitute part of their business operations. With an electric distribution system, con-

struction, maintenance, reconstruction and operation and service are so intertwined and interwoven that the two are inseparable. Construction is as essential to its operation as is the current which it transmits. Construction cannot be divorced from its operation. Without continuous construction, it cannot operate.

The Petitioner was injured while on a substation which Respondent was constructing by contract. The fact that he sustained his injury while on a sub-station, he argues, serves to give rise to relief for him under the common law, in addition to his remedy previously exercised under the provisions of the Workmen's Compensation Act. In effect, he argues that a substation is not an integral part of an electrical distribution system; that it is a sort of unrelated facility and its construction does not constitute part of the construction of the system. Nothing could be further from the fact. An electrical distribution system can no more operate without sub-stations than it can without transformers, lines, poles, cross-arms, insulators, anchor wires, meters and other essentials. With a growing system the stations must undergo frequent change, enlargement and/or replacement, so that larger and heavier power loads may be handled. The construction and the growth of Respondent's system has been steady and continuous and it has been pursued by the Respondent exercising the powers and engaging in the business which it was authorized by statute to perform.

II

The question of whether Petitioner's injuries were sustained while he was engaged in work which constituted a part of Respondent's business, trade and occupation constituted a question of law for the Court and not an issue of fact for the jury.

In the Court below it was conceded by Petitioner that both Respondent (the owner) and Bouligny (the contractor) had complied with and were operating under the Workmen's Compensation Act; that after Petitioner's injuries were sustained, he had elected to receive and had accepted full compensation

benefits under said Act from Bouligny; it was also conceded that if the work being done at the time of Petitioner's injury constituted a part of the business of the Respondent, the present suit must fail. The case proceeded to trial with the Petitoner having admitted into the Record all requirements of this legal defense except one; to wit: that the work being done by the contractor constituted a part of the trade, business and occupation of the Respondent or stated otherwise, in the meaning of the Workmen's Compensation Act, was the Petitioner the employee of the Respondent. The Respondent moved for a directed verdict or involuntary dismissal at the close of Petitioner's testimony and at that time, the District Judge ruled that only one queston was left open after Petitioner's admissions, that being "Whether claimant was injured while engaged in an operation which entered directly into and became a part of the business for whom the work was being done?" *Doane, et al v. E. I. DuPont deNemours & Co.*, supra.

The issue presented here arises under the provisions of the South Carolina Workmen's Compensation law, a special statute which divests the jury of its normal function in connection with questions arising thereunder and was clearly a question of law for the Court. In the recently decided case of *Adams v. Davison-Paxon Company,* (1957), supra, the South Carolina Supreme Court specifically held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision by the Court, which includes the finding of the facts which relate to jurisdiction. The opinion stated:

> "Thus the trial court should have in this case resolved the conflicts in the evidence and determined the fact of whether Emporium was performing a part of the 'trade, business or occupation' of the department store-appellant and, therefore, whether respondent's remedy is exclusively under the Workmen's Compensation Law. This was included in appellant's grounds for directed verdict; upon consideration of the evidence we are constrained to hold that it was error to refuse the motion to direct the verdict in favor of appellant."

Also, the opinion further stated:

> "In the case in hand it appears that appellant and Emporium operated within the coverage of the compensation law; but that of Emporium must have been voluntary because they had only three employees in appellant's store. Secs. 72-107(2) and 72-109. Except for this voluntary assumption by Emporium of liability under the act and except for the effect of Sec. 72-111, plaintiff would be without the protection of workmen's compensation. For it she gave up the right to proceed at common law in an action for damages. As has been said by many courts in many decisions, if an employer is within the act to bear its liabilities, he must remain to be accorded its immunities, in the absence of a clearly expressed legislative intention to the contrary. In the instant case, and in others similar, appellant is entitled to workmen's compensation without burden upon her to prove actionable negligence on the part of the owner or its contractor, and is immune from the usual defenses in employee against employer actions at law.
>
> "We are not called upon in this appeal to decide whether she should proceed against Emporium or both, for the compensation benefits to which the facts appear to entitle her. Here we only decide that she is not entitled to maintain this action at law. Sec. 72-121 so limits her remedy."

While it is obvious that the question presented did not raise an issue of fact for the jury but constituted a question of law for the Court, we submit that the material facts in the case all point in one direction and lead to the inescapable conclusion that Petitioner, when he sustained the injury complained of, was engaged in work which constituted a part of Respondent's trade, business and occupation. The evidence in the case is susceptible of no other reasonable inference than that the construction of the substation, on which Petitioner was standing, and the wire to which he reached and touched in the course of his work when his injuries were sustained, were essential to the successful and proper operation of Respondent's electric distribution system; that the facilities

when completed, became an essential and integral part of its operating system and that accordingly, when Petitioner sustained his injuries, he was engaged in work which was essential and entered directly into and became a part of the business of the person for whom the work was being done. The evidence has not been and cannot be disputed that Respondent, with its own employees, continuously and by special contracts, from time to time, has carried on construction work on its own operating distribution system; that construction work on the system in its various aspects and types goes hand in hand with the distribution and sale of its product, electric energy, each being essential and complementary to the other in the operation of its system. The evidence is susceptible of no other reasonable inference that Respondent's employees constructed substations, although, as has already been pointed out, it is of no consequence whether they constructed three or some other number or none, so far as the issue here is concerned.

In his Petition for Writ of Certiorari and twice in his brief on the merits, the Petitioner has listed seven items which he contends constitute questions for a jury. We list these items here with our comment following each.

Q. 1. "That Respondent had six substations".

Comment: Certainly, there are no inferences to be drawn from this on the issue in question. Whether it had six, more or less than six, could have no bearing on the question involved.

Q. 2. "That on direct and cross-examination Respondent's manager, A. J. Hurt, testified that three of the substations were constructed by Respondent's own facilities and employees, the last of which was constructed at Liberty, South Carolina, three years prior to Petitioner's injuries".

Comment: On direct examination Mr. Hurt testified that Respondent's employees constructed three substations. He did not testify that they constructed three of the six then in use. On cross examination, when asked to name the substations they constructed, he testified that they built the original ones at Liberty, Tigerville and Westminster. He did not testify that

the last of the three was built at Liberty, South Carolina, three years before. He testified that a station was built at Liberty three years earlier. If the witness had said what Petitioner contends for, which he certainly did not, no inferences could have been drawn from the statements material to the issue as to whether Petitioner was engaged in work at the time of his injuries which constituted a part of Respondent's business.

Q. 3. "That on being recalled to the stand for recross-examination the following day, Mr. Hurt stated that Respondent did not use its own facilities and employees to construct its substation at Liberty, South Carolina, three years prior to Petitioner's injuries, but that the work was done by the independent contracting construction firm engaged in business of constructing substations".

Comment: The witness had never testified that the substation, then in use at Liberty, was constructed other than by contract. He had not testified by whom it was constructed. Furthermore, inferences as to how and when the last substation was constructed at Liberty, are not material as to whether Petitioner sustained his injuries while engaged in work which constituted a part of Respondent's business.

Q. 4. "That Mr. Hurt finally testified that the Respondent did not use its facilities or employees to build any of its six substations".

Comment: As above pointed out, Mr. Hurt never did testify that Respondent's employees built any of the substations in use at the time of the trial. Furthermore, whether the substations constructed by Respondent's employees were or were not in use at the time of the trial is not material to the issue here involved.

Q. 5. "That Mr. Hurt's testimony was evasive as to the number of substations Respondent operated".

Comment: "When asked to do so, the witness identified every substation Respondent had by giving its location. What more could he have done? There was nothing evasive about this. Furthermore, the numer of substations Respondent had

at the time of the trial has no bearing on the basic issue here involved.

Q. 6. "That he refused to answer a material question propounded by Petitioner's counsel and continued to give evasive answers until finally cautioned by the District Judge that refusal to directly answer the question might directly subject the witness to contempt of Court".

Comment: The only time the witness failed to answer was on deposition, when the same question had already been put and answered numerous times and counsel instructed him not to answer the question. The record will show that he did not refuse to answer any question in Court. The first question put to him was answered promptly and properly. Upon his answering the very first question asked, the Court threatened him with contempt proceedings because of the answer given. How can it be said "that he refused to answer a material question propounded by Petitioner's counsel and continued to give evasive answers until finally cautioned by the District Judge that refusal to directly answer the question might directly subject the witness to contempt of Court", when his prompt answer to the very first question asked was the one in connection with which the Court threatened the contempt action? The Court's shocking action came when he first took the stand and when he answered the first question asked. In the light of the Record in the case, which is plain and clear, the statement in item 6 is quite surprising. Furthermore, what action the Court threatened to take against the witness has no bearing on the basic issue here involved.

Q. 7. "That Mr. Hurt's testimony on deposition taken before trial was in direct conflict with the knowledge he professed to have about material facts to which he testified at the trial".

Comment: If the witness testified one thing on deposition and the opposite on trial, the testimony could be pointed out. This is not done, because it cannot be done. On deposition, the witness had not read the contract between Respondent and Bouligny which inspection will reveal to be extensive

between the plaintiff and the defendant. Let no other costs be taxed.

s/ G. BADGER BAKER
Judge of the Twelfth Judicial Circuit

At Chambers
Florence, S. C.
September 28, 1957.

CLARENCE HUDSON, PLAINTIFF

versus

HORRY ELECTRIC COOPERATION, INC., DEFENDANT.

ORDER DISMISSING APPEAL

Upon consideration of the Notice of Motion to Dismiss Appeal in this matter returnable before me this day, and upon consideration of the affidavit, certificate, and the record in the cause, it appears that the plaintiff-appellant has failed to perfect his appeal in accordance with the requirements of law. See *Wade v. Gore*, 154 S.C. 262, 151 S.E. 470. It is, therefore, on motion of Burrough and Green and Williams and Henry, attorneys for defendant.

ORDERED that the appeal of the plaintiff to the Supreme Court of South Carolina be, and the same hereby is, dismissed for failure to perfect same.

s/ G. BADGER BAKER,
Judge of the Twelfth Judicial Circuit

At Chambers
Florence, S. C.
November 23, 1957.

III

The Petitioner, whose motion in the District Court to strike an affirmative defense was granted and who was simultaneously offered an opportunity to present reply testimony on the same defense upon which the Respondent based a motion for a directed verdict which was overruled, does not have the right to a new trial upon the ground that Appellate Court did not have the power to reverse the rulings of the District Judge with direction to enter judgment for the defendant.

At the close of Respondent's testimony in the District Court, the Petitioner moved to strike Respondent's affirmative defense that this action was barred under the provisions of the South Carolina Workmen's Compensation law. The Court immediately asked Petitioner's counsel if he contemplated offering any testimony in reply if the motion was overruled (R. 48). The Petitioner's counsel stated that he did not know of any reply that was necessary and he did not suggest that at any time that Petitioner had any reply testimony to offer. The Court advised prior to ruling on the motion that Respondent's counsel would likely move for a directed verdict on the same ground since the issue was a question of law (R. 49). The District Judge granted the motion to strike and then upon Respondent making its motion for a directed verdict, he allowed Respondent to include as a ground for its motion the defense which had just been stricken. Thus, the Petitioner contends that his action in the District Court in moving to strike this affirmative defense at the conclusion of Respondent's testimony and in failing to offer reply testimony thereto, divested the Court of Appeals of the power to reverse the judgment of the District Court and to direct entry of judgment for Respondent on the legal defense that had been alleged and established in bar of Petitioner's action. There is no question that Petitioner had full opportunity and occasion in the District Court to offer reply testimony to the Respondent's case on this or any other issue. He stated that he did not know of any reply that was necessary when directly asked by the

Court if he would offer any testimony and he remained silent when the Court expressly allowed Respondent to reserve its rights and to include this same defense in its grounds for a directed verdict. We have previously pointed out in this brief that in the Court below the Petitioner contended that the trial Judge was correct in withdrawing the issue of the application of the Workmen's Compensation Act as a bar to Petitioner's action upon the grounds that it was a matter of law. The Petitioner now argues that the granting of his motion to strike should have been affirmed by the Court below but, on the other hand, he argues that the facts on which the issue was decided were for the jury or at least he should be given the opportunity to try the case again and attempt to make an issue for the jury. The very issue upon which Petitioner now claims he is entitled to a determination by jury was removed from the jury in the District Court upon his own motion and he made the claim of the right for the first time in his Petition for Rehearing in the Court below.

In the District Court, as pointed out in discussion in our Question I, the District Judge overruled Respondent's motion for direction of a verdict on an erroneous concept of the applicable law. There was no invasion of the province of the jury contrary to the Seventh Amendment to the United States Constitution in the action of the Court below and the procedure was consistent with applicable Federal procedure. If a litigant in the District Court could elect to withhold evidence when opportunity is afforded to offer it and could secure a new trial on the basis of the election, the trial Court would become a testing ground for the wits of counsel and not a tribunal for the administration of justice. The opinion in *Bryan v. United States*, 70 S. Ct. 317, 338 U. S. 552, stated that when the Judicial Code was revised in 1948, the provisions of Sections 876 and 877 relating to the power of the United States Supreme Court and that of the Court of Appeals on remand were dovetailed into a single section, 28 U.S.C. 2106 and 28 U.S.C.A. 2106. (See Constitutional and statutory provisions involved). Under this statute for the first time the power of the Supreme Court and the Courts of Appeals to enter judgment

when remanding a case to the lower Court is set out in identical language in a single section. That co-extensive power is to direct "such appropriate judgment * * * as may be just under the circumstances". If the Court of Appeals finds that the District Court has erred in a matter of law, it may reverse and remand with direction to enter an appropriate judgment. The Court of Appeals must look to the aforementioned statute defining its appropriate power for guidance as to the kind of Order which it may direct the District Court to enter and in the present case there could be no question that the Court below was vested with the power to reverse the rulings of the District Judge with direction to enter judgment for the Defendant.

We respectfully say again that the evidence in the case was susceptible of no other reasonable inference than that the work being done at the time Petitioner received his injuries was a part of the trade and business of the Respondent. The Court below concluded that the work performed by Bouligny under the contract was done in carrying on the trade or business of Respondent and when the issue was considered pursuant to the appeal from the refusal by the District Court of Respondent's motions for a directed verdict and judgment non obstante veredicto, it was a matter of law for the Court below.

Furthermore, we submit that under the applicable and controlling authorities there can be no doubt that it was strictly an issue of law for the Court to determine as to whether Petitioner's claim against Respondent under the common law was barred by reason of the terms and provisions of the South Carolina Workmen's Compensation Law. The Petitioner has not been deprived of any rights to a jury trial if the issue could not have been properly submitted for the jury's determination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below reversing and remanding the judgment of the District Court with direction to enter judgement for Respondent should be affirmed.

Respectfully submitted,
WESLEY M. WALKER
Greenville, South Carolina
RAY R. WILLIAMS
Greenville, South Carolina

APPENDIX

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
COURT OF COMMON PLEAS

CLARENCE HUDSON, PLAINTIFF, *versus*
HORRY ELECTRIC COOPERATIVE, INC., DEFENDANT.

REPORT OF SPECIAL REFEREE

The above matter was instituted in the Court of Common Pleas for this County by a Summons and Complaint under the date of November 21, 1952, in which the Plaintiff sought Judgment against the Defendant for damages on account of personal injuries alleged to have been sustained by the Plaintiff on or about August 11th, 1949, while the Plaintiff was employed by Little Electric Company and engaged in construction of an electric power line in Horry County, South Carolina.

The Defendant, in due time, filed an Answer containing some five Defenses, including a Defense by way of affirmative relief, in which a Declaratory Judgment was sought.

By an Order of Honorable Steve C. Griffith, the Presiding Judge of the Twelfth Judicial Circuit, dated February 2, 1954, the issues raised in the Fifth Defense of the Answer were referred to the undersigned as Special Referee for the purpose of determining the issues and reporting the findings of fact and conclusions of law.

Pursuant to the above Order, I held references at the Horry County Court House in Conway, South Carolina, on the 30th day of May, 1957, and the 27th day of June, 1957, and took the evidence offered by the parties. The record of such references is submitted herewith and reflects the proceedings at such references.

In view of the terms of the Order of Reference, I am presently concerned with only the issues raised by the Fifth Defense in the Defendant's Answer, and I am of the opinion,

after carefully considering the matter, that disposition of this Fifth Defense is really determinative of the entire matter.

It is undisputed, as I understand, that at the time the Plaintiff Hudson was injured, he was employed by Little Electric Company, and that at the time of such injuries, he was engaged in construction of an electric power line in the course of his employment with Little Electric; and that the electric power line on which the Plaintiff Hudson was working at the time of his accident was being constructed by Little Electric Company under a Contract with Horry Electric Co-operative, Inc. It was further admitted that at the time of this accident, both Little Electric Company and Horry Electric Cooperative, Inc. had complied with and were then operating under the Workmen's Compensation Act of the State of South Carolina. It was likewise conceded that following his injury, the Plaintiff Hudson had accepted full benefits under the Act.

As I view the matter, therefore, if the work in which the Plaintiff Hudson was engaged at the time of his accident and injury constituted a part of the business of Horry Electric Cooperative, Inc., his recovery is limited to the benefits provided by the Workmen's Compensation Act, and the Defendant would be entitled to a Declaratory Judgment or Decree to the effect that the present suit cannot be maintained.

We must, therefore, examine the facts in order to reach some determination of this issue and I shall at this point attempt to do so.

The Horry Electric Cooperative was organized as a rural Electric Cooperative on April 25, 1940, under the provisions of the Rural Electric Cooperative Act of this State. See *Sections* 12-1001, et seq., South Carolina Code 1952. The Cooperative thereupon undertook and since that time has engaged in the furnishing of electricity to residents of the rural area of this County, in compliance with the terms of the Statute. Subsequent to its incorporation, and on or about January 7, 1941, the Horry Electric Cooperative, Inc. took over from the State Rural Electrification Authority (likewise created by Statute) the lines, facilities and customers of the Authority. The Horry

Electric Cooperative has continued its operations since that time, and according to the testimony, has constantly expanded operations.

I find from the record that at the time Horry Electric Cooperative took over the operation from the State Rural Electrification Authority, there was in existence 198 miles of electric distribution line serving 753 consumers. In 1949, the Cooperative had approximately 1100 miles of distribution lines serving approximately 5500 consumers. At the end of 1956, the Cooperative had 1,590 miles of line serving approximately 7400 consumers. In 1940, the average kilowatt hour consumption was approximately 27 kilowatt hours per consumer, and by the end of 1956, the consumption had reached approximately 238 kilowatt hours per consumer. In 1949, the Cooperative had six linemen on construction work, three ground men, two linemen on maintenance work, and two truck drivers.

It is apparent, I think, that the steady growth of the Cooperative and the consistent increase in consumption of electric energy was dependent upon the construction, re-construction and maintenance of its distribution lines. As I view the matter, the construction of new lines, as well as the reconstruction, alteration and maintenance of existing lines were all vital parts of the business and trade of the Cooperative.

The record clearly indicates that the construction of new lines, the re-phasing and re-construction of existing lines has been done not only by Contract, but by the Cooperative's own employees, has been performed subject to standards prescribed by the National Rural Electrification Administration, and subject to the supervision of some Engineering Firm or Specialist. It is apparent from the record that the Cooperative owns and maintains equipment used in the construction of lines, and that it keeps on hand in its warehouse materials and supplies required in the construction of new lines, the extension of existing lines, the re-construction of lines and maintenance of its system.

Following the War, the Cooperative was faced with a backlog of requests for service and in order to meet the growing needs of this community and in order to expedite its con-

struction and conversion program, it let Contracts from time to time for portions of the work—the other portions being carried on by the Cooperative through its own employees. On or about August 31, 1949, the Cooperative entered into a Contract with Little Electric Company for the construction of 72.38 miles of new distribution line and for the conversion of 62 miles of line. At the same time that Little Electric Company was carrying out its Contract, the Cooperative was engaged in similar work at other points on its system. According to the record, the Cooperative and its employees were then doing the same type and character of construction and conversion, under the same standards and specifications as the work being done by Little Electric Company and its employees under the Contract above referred to. According to the record, the Cooperative and its employees have constructed approximately fifty per cent of the lines which have been added since the Cooperative acquired the system from the State Rural Electrification Authority. According to the testimony, in 1949, and 1950, the Cooperative constructed something in the neighborhood of 100 miles of distribution lines with its own employees. Under the Little Contract, approximately 130 to 140 transformers were to be installed, whereas, the Cooperative installed with its own employees during the year 1949, approximately 600 transformers. The only difference in the transformers would have been the capacity. In short, there appears to be no difference in the working performed under the Little Contract and the work performed by the Cooperative with its own employees.

The moving force and chief actor in the entire matter was the Cooperative itself. This becomes clear when the procedure is examined. The Cooperative obtains applications from its prospective customers. It dispatches its employees to the field for the securing of rights-of-ways. It collects the data and, in turn, transmits this to an Engineering Firm engaged by the Cooperative. This Engineering Firm renders to the Cooperative the engineering services necessary for the design and construction of the particular project. Based upon studies made by it, the Engineering Firm prepares a map of proposed new lines and proposed conversion, which, in turn, is submitted by the

Cooperative to the National Rural Electrification Administration with a request for funds to finance the proposed work. If approved by the Administrator, the necessary loan papers are prepared and executed and the work is thereafter undertaken. As to that portion of the work done by Contract, the Engineering Firm engaged by the Cooperative prepares a proposal for bids, setting forth the plans and specifications and a map of the proposed work. Subject to the approval of the Administrator of the National Rural Electrification Administration, a Contract is entered into between the successful bidder and the Cooperative. This Contract sets forth in great detail the work to be undertaken and the materials to be used. Under the Contract, portions of the materials are purchased and supplied by the Cooperative to the Contractor.

There can be no doubt that the Horry Electric Cooperative was not only engaged in the business of supplying electric energy to Rural consumers, but also in the business of constructing, re-constructing and altering lines necessary for the distribution of electric energy. There can be no doubt that the work covered by the Little Electric Contract was of the type and class which Horry Electric Cooperative was empowered by its Charter to carry out; and all of it was essential to serving the needs of its Rural communities.

The constant growth of the Cooperative's system, the increase in use of electric energy by its members indicates beyond question that lines must be re-worked and made heavier; transformers must be enlarged and lines re-phased. It is obvious that growth demands new construction. Moreover, the component parts of an electric system are expendable. Some items are short-lived.

I cannot, therefore, escape the conclusion that new construction, conversion, re-construction, re-phasing and maintenance are all integral parts of the business of the Cooperative. The work done by Little Electric Company and its employees in 1949 was a part of the trade and business of Horry Electric Cooperative.

The Plaintiff having been employed by Little Electric Company on the job in question was the Statutory employee of

Horry Electric Cooperative, Inc. at the time he sustained his injury. In the case of *Marchbanks v. Duke Power Company*, 190 S.C. 336, 2 S.E. (2d) 825, which perhaps is one of the leading cases on the subject in this State, our Court held that the employee's remedy was restricted to the Workmen's Compensation Act. In the *Marchbanks* case, the Power Company contracted for the painting of certain poles and during the progress of the work, one of the Contractor's employees was injured. An action in tort was brought against the Power Company. The Court concluded that the work being carried on was a part of the owner's trade and business, and that the worker's sole remedy was under the Act.

Reference might also be had to the case of *Boseman v. Pacific Mills*, 193 S.C. 479, 8 S.E. (2d) 878, in which a similar result was reached. In the *Boseman* case, the Mill contracted for the painting of a water tank used by the Mill for protection against fire. During the course of the work, one of the Contractor's employees was killed. It was there held that the matter was controlled by the Workmen's Compensation Act inasmuch as the work upon the tank was an integral part of the business of the Mill.

The United States Court of Appeals for the Fourth Circuit recently decided a case, which is strikingly similar to the case now under consideration. The reasoning of the Court of Appeals seems unanswerable and leads to the conclusions reached in the present case. Reference might be had to the case of *Blue Ridge Rural Electric Cooperative, Inc. v. James Earl Byrd*, 238 F. (2d) 346. This case was decided October 1, 1956, the Opinion having been written by Circuit Judge Soper.

Reference might also be had to the following cases: *Kennerly v. Comulgee Lumber Company*, 206 S.C. 481, 34 S.E. (2d) 792; *Hopkins v. Darlington Veneer Company*, 208 S.C. 307, 38 S.E. (2d) 4; *Adams v. Davison-Paxon Company*, 230 S.C. 532, 96 S.E. (2d) 566.

Under the terms of the Workmen's Compensation Act, where an owner undertakes work which is a part of his business, and contracts with another for performance of that work, either

in whole or in part, the owner is liable for the payment of compensation to any workman employed in the work to the same extent as if that workman had been immediately employed by him. See Section 72-111. Where a Contractor agrees to perform work for another, and contracts with a Sub-contractor to perform all or part of the work, the Contractor is liable to pay compensation to the Workmen of the Sub-contractor. *Section* 72-112. Reference should also be had to *Section* 72-113, where provision is made for the liability of the Subcontractor to workmen of the Subcontractor. Under the provisions of *Section* 72-115, where a principal Contractor is liable to pay compensation, he may obtain indemnity from any person who would have been liable to pay compensation independently of the Sections herein involved. Under the terms of the Act, a workman may recover compensation from either the Subcontractor, or the principal Contractor, but not from both. See *Section* 72-116. The rights and remedies granted under the Statute to an employee exclude all other rights and remedies of the employee as against his employer on account of injuries, and where an employee accepts an award under the Statute, he is barred from proceeding further. See *Sections* 72-121 and 72-123.

I conclude, therefore, that the Plaintiff, having elected to accept compensation under the provisions of the Workmen's Compensation Act and having been compensated by the Carrier for Little Electric Company, cannot now maintain an action in tort against the Defendant. The Defendant is, therefore, entitled to a Declaratory Judgment to that effect.

Respectfully Submitted,
JOHN B. MCCUTCHEON,
As Special Referee.

Conway, South Carolina.
August 30, 1957.

CLARENCE HUDSON, PLAINTIFF

versus

HORRY ELECTRIC COOPERATIVE, INC., DEFENDANT.

DECREE

This matter comes before me on motion by attorneys for the defendant to confirm the report of the Special Referee dated August 30, 1957 and filed on August 31, 1957 in the office of Clerk of Court for Horry County. The notice of motion for confirmation was dated September 18, 1957 and stated that no exceptions to the report had been filed.

Subsequently, under date of September 23, 1957 a letter was received from one of the attorneys for the plaintiff indicating that exceptions were being forwarded to counsel for the defendant and asking that determination of this matter be postponed pending adjudication of a certain appeal to the United States Supreme Court in the case of *Byrd. v. Blue Ridge Electric Cooperative*. No appearance has been made before me on the scheduled date in opposition to the motion to confirm the the report of the Special Referee and there has been no showing as to what issues are being appealed to the United States Supreme Court in the Byrd Case, or the relationship of those points of appeal to the present case.

Counsel for the defendant appearing before me stated that he had refused to accept service of the exceptions and had returned them to the plaintiff's attorney who had prepared and transmitted same. Counsel further stated that a copy of these exceptions had been made before returning them and those were exhibited to me. The exceptions were not filed within the time fixed by law. No request has been made to permit the filing of same, nevertheless I have inquired into the nature of the case, considered the report of the Special Referee, reviewed the record in the cause, and, having done so, concur in the findings of fact and conclusions of law made and determined by him.

It is, therefore, on motion of counsel for defendant, ORDERED, ADJUDGED AND DECREED:

I

That the report of John B. McCutcheon, As Special Referee, dated August 30, 1957 be, and the same hereby is, confirmed and made the judgment of this Court.

II

That the Plaintiff, Clarence Hudson, having been compensated by the insurance carrier for his immediate employer, Little Electric Company, for injuries suffered by him while said Little Electric Company was engaged in work which constituted an integral part of the trade, business or occupation of the defendant Horry Electric Cooperative, Inc., at a time when both Little Electric and Horry Electric Cooperative were operating under the Workmen's Compensation Law of South Carolina, has no right to recover against the defendant at Common Law. His rights are limited to and determined by the Workmen's Compensation Law of South Carolina and since plaintiff elected to recover, and received, compensation thereunder from his employer Little Electric Company and its compensation carrier American Automobile Insurance Company he cannot recover against the defendant Horry Electric Cooperative, Inc.

III

That the matters and things set up in the defendant's Fifth Defense in its answer have been established and a declaratory judgment in favor of the defendant, denying the claim of the plaintiff, is hereby granted.

IV

Upon consideration of the record in the cause it appears that the Special Referee gave careful consideration to the evidence and the law in the report filed by him in addition to the time spent in connection with the hearings. I find that a fee of Two Hundred and Fifty ($250.00) Dollars would be proper compensation for his services, and since the matter was referred to him by consent this charge should be divided equally